79407-3
No. 33262-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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IN RE THE PERSONAL RESTRAINT OF ALEXANDER N. RIOFTA,

ALEXANDER N. RIOFTA, Petitioner

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**PETITIONERS REPLY BRIEF**

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## I. INTRODUCTION

Alex Riofta was convicted of first degree assault based solely on an eyewitness identification by the victim, and in spite of facts tending to suggest that the identification was uncertain and inaccurate. *See* Brief at 14-18. There was no physical evidence linking Mr. Riofta to the crime. However, police recovered from the scene a white hat which the victim identified as having been worn by the person who shot at him. Despite the availability of DNA technology which might have produced evidence showing that Mr. Riofta was not the shooter, trial counsel did not request DNA testing of the white hat. Counsel thereby failed to secure what may have been the strongest available evidence of Mr. Riofta's innocence.

Mr. Riofta has consistently maintained his innocence, and believes there is a strong likelihood that DNA testing of the white hat will result in a match with a DNA profile in Washington's Combined DNA Index System (CODIS).[1] Convicted felons are required to submit DNA samples for indexing in the CODIS database, and Jimmy Chea, a client of Ms. Minchau, told her that Ratthana Sok's actual assailant was not Mr. Riofta, but a violent offender previously convicted in the State of Washington.

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[1] As of August 2005, there were over 80,000 offender profiles in the Washington database, and CODIS "hits" – matches between DNA evidence and profiles in the database – had assisted in nearly 300 investigations. Federal Bureau of Investigation, Washington CODIS Statistics, *at* http://www.fbi.gov/hq/lab/codis/wa.htm (last visited Oct. 16, 2005).

*See id.* While Mr. Chea's statement is admittedly hearsay, DNA testing of the white hat which resulted in a CODIS "hit" would provide Mr. Riofta with scientifically reliable evidence to support his ineffective assistance of counsel claim.

Mr. Riofta now asks this Court to order DNA testing of the white hat, so that the merits of his Sixth Amendment claim may thereafter be properly adjudicated. Under Washington law and the facts of this case, he has made "at least a prima facie showing of actual prejudice," so that his petition should not be summarily dismissed. *Hews v. Evans*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). He asks this Court to order DNA testing of the white hat – or, in the alternative, a reference hearing – to resolve the factual question of whether the hat contains exculpatory evidence which would support his ineffective assistance of counsel claim.

## II. ISSUES PRESENTED

1. Whether the validity of Mr. Riofta's conviction can be upheld unless his ineffective assistance of counsel claim is evaluated in light of all the available evidence, particularly where the Prosecution refuses to make all of the evidence available.

2. Whether the Prosecution's refusal to release the white hat for DNA testing also violates Mr. Riofta's right to due process under the Fifth and Fourteenth Amendments, especially where that refusal denies Mr. Riofta the opportunity to support his Sixth Amendment claim.

3. Whether this Court should order DNA testing of the white hat, where that testing would not only establish the viability of Mr. Riofta's ineffective assistance of counsel claim, but would also ensure that the prosecution had fulfilled its obligations under *Brady v. Maryland.*

## III. ARGUMENT

Mr. Riofta's personal restraint petition is based on the claim that his Sixth Amendment right to counsel was violated. In order to meet the burden of showing prejudice, Mr. Riofta has requested that the Prosecution release the white hat for DNA testing. Because the Prosecution has denied that request, Mr. Riofta has asserted a due process right, under the Fifth and Fourteenth Amendments, of access to exculpatory evidence. In its response, the State not only seeks to avoid the

obligations imposed by *Brady v. Maryland*, but fails to recognize the Washington court rules and legal precedent which require DNA testing of the white hat.[2]

**A. Mr. Riofta's personal restraint petition is based on the valid constitutional claim that he was denied his Sixth Amendment right to the effective assistance of counsel.**

Mr. Riofta's ineffective assistance of counsel claim should be adjudicated in light of all the available evidence. Because the State may yet be in possession of evidence supporting Mr. Riofta's claim, this Court should first grant Mr. Riofta access to that evidence, and then consider his constitutional claim on its merits. The State argues that Mr. Riofta may not "recast" his ineffective assistance of counsel claim because it "was already considered and rejected by this court on direct appeal." Response at 19 (citing *In re Benn*, 134 Wn.2d 868, 906, 952 P.2d 116 (1998)). In *Benn*, the Supreme Court of Washington found that a petitioner whose *Brady* claim was rejected on direct appeal could not raise the same issue in a post-conviction ineffective assistance of counsel claim. 134 Wn.2d at

[2] Mr. Riofta has also requested DNA testing under the revised version of RCW 10.73.170, which went into effect on March 9, 2005. The statute now provides for DNA testing not only where, at the time of trial, "DNA testing did not meet acceptable scientific standards" or "DNA testing technology was not sufficiently developed to test the DNA evidence in the case," but where such testing "would provide significant new information." RCW 10.73.170(2)(a). His motion before the Superior Court of Pierce County was denied, and he has appealed from that decision. *See* App. 1 (McMurtrie Declaration). However, the time bar on collateral attacks imposed by RCW 10.73.090 required Mr. Riofta to file this personal restraint petition before his claim under the statute could be resolved.

906. Mr. Riofta is not "recasting" his ineffective assistance of counsel claim in the manner proscribed by the court in *Benn*; he has not presented "identical grounds for relief . . . supported by different legal arguments or couched in different language." *Id.* (citation omitted). Instead, he renews his ineffective assistance of counsel claim on the grounds that it has yet to be properly adjudicated on the merits, and cannot be said to have been "resolved on direct review." *See In re Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). It follows that "the ends of justice would be served" by this Court's consideration of that claim, following DNA testing of the white hat. *See id.*

Counsel should have requested that testing the time of trial, and Mr. Riofta now relies on this Court to correct that error; it bears repeating that "we punish criminal defendants for their crimes, not for their attorneys' mistakes." *New Jersey v. Thomas*, 586 A.2d 250, 254 (N.J. Super. 1991). Mr. Riofta's trial attorney never discussed the possibility of DNA testing with him, and he offers no strategic or pragmatic reason for his failure to request DNA testing of the white hat. *See* Appendices in Support of PRP (App. 7 (Walker Declaration)). Indeed, that failure is at the heart of Mr. Riofta's ineffective assistance of counsel claim, which, as the State correctly observes, requires him to "show that he . . . was prejudiced by the deficient representation." Response at 20 (citing

*Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The State's refusal to release the white hat for DNA testing, however, has denied Mr. Riofta the opportunity to make that showing. DNA testing would allow the prejudicial effect of counsel's failure to seek testing to be established with precision and reliability. Without it, the truth remains hidden,[3] and the validity of Mr. Riofta's conviction remains in doubt.

1. Counsel's failure to request DNA testing of the white hat worn by the shooter, along with his failure to make other reasonable efforts in Mr. Riofta's behalf, constitutes deficient performance.

In numerous respects, the performance of Mr. Riofta's trial attorney "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Despite indications that Mr. Riofta suffered from multiple psychological disorders, counsel neither obtained a psychological evaluation of his client nor raised the issue of his competency to stand trial. *See* Brief at 27. Although the only evidence tending to identify Mr. Riofta as the shooter was the eyewitness testimony of the victim, counsel neglected to consult with an expert on eyewitness identification, or to present the testimony of such an expert at trial. *See id.* at 28. Counsel's

[3] Pierce County Deputy Prosecutor Jerry Costello, for his part, has commented on the potential benefits of DNA testing in other cases: "As prosecutors, we do want the truth to be out there." Tracey Johnson, *Convicted Killer is first to try out new DNA Law*, Seattle Post-Intelligencer Reporter, Feb. 5, 2002.

most serious deficiency, however, was his failure even to investigate the one piece of physical evidence which might have exonerated his client. In short, Mr. Riofta's trial attorney failed to explore avenues for challenging the most critical evidence offered against him by the prosecution, and he also failed to take a thorough inventory of the evidence which might be offered in his defense. Those failures amount to a breach of his duty, set down by the Court in *Strickland*, "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691.

While the State speculates that counsel's failure to request DNA testing was strategic, *see* Response at 19-20, trial counsel himself has suggested nothing of the sort. Given the circumstances surrounding Mr. Riofta's case – including the connection between Ratthana Sok and the Trang Dai murder case, the questions surrounding his eyewitness identification, and the corroboration of Mr. Riofta's alibi – competent representation would require that counsel at least discuss the possibility of DNA testing with his client. Mr. Riofta's trial attorney does not claim to have done that much. *See* Appendices in Support of PRP (App. 7 (Walker Declaration)). His statement, in fact, reinforces the impression that Mr. Riofta's defense was thoroughly compromised by counsel's failure to investigate. Rather than explaining his decision not to request DNA

testing, counsel merely explains what he might have done had he been provided with more information. *See id.* These considerations work to rebut the presumption that "the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. In reality, counsel "neither conducted a reasonable investigation *nor made a showing of strategic reasons for failing to do so*." *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002) (citing *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994)) (emphasis added). In such cases, the Ninth Circuit Court of Appeals has repeatedly found ineffective assistance, notwithstanding its recognition that "judicial scrutiny of counsel's performance must be highly deferential."[4] *See Avila*, 297 F.3d at 918 (quoting *Strickland*, 466 U.S. at 689). Mr. Riofta's case is among those in which counsel's performance cannot withstand even that "highly deferential" scrutiny.

Neither the nature of the crime nor the potential source of the DNA evidence in this case renders counsel's performance reasonable. The State attempts to distinguish Mr. Riofta's case from *State v. Hicks*, 536 N.W.2d 487 (Wis. 1995), on two grounds. First, the State argues that unlike the hair samples in *Hicks*, the white hat was not "a major component" of the

[4] Even where counsel contends that the decision not to request DNA testing was strategic, a court is not bound to accept that explanation. That is one of the lessons of *State v. Hicks*, in which the court found that counsel's assertion of a "strategic reason" for his decision "does not insulate his decision-making from analysis." 536 N.W.2d 487, 491 (Wis. 1995).

State's case. Response at 22. With regard to the white hat, however, certain facts are not in dispute. The white hat was worn by the shooter. It figured prominently in Ratthana Sok's description of his assailant. It was among the only physical evidence recovered at the scene. It was introduced at trial by the prosecution, presumably to corroborate Mr. Sok's description of the shooter, thereby enhancing the credibility of his identification. Most importantly, wherever its rank among the components of the State's case, it was a potential source of reliable, exculpatory DNA evidence. Counsel's failure to investigate that possibility was neither strategically sound nor objectively reasonable.

The second distinction drawn by the State between this case and *Hicks* also fails to demonstrate that counsel's failure to request DNA testing was reasonable. It does not matter that "this was not a sexual assault case where the presence or absence of one's pubic hair could be dispositive."[5] Response at 22. Indeed, very little of the evidence presented by competent defense attorneys is dispositive in and of itself;

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[5] In the same vein, the State urges that this case "is not like a rape or murder case where the presence of semen or blood of the subject or victim may be dispositive of the entire case," Response at 14, but it is worth noting that blood and semen are far from the only reliable sources of DNA evidence. In addition to hair, even very small quantities of other biological material can be tested: "Evidence invisible to the naked eye can be the key to solving a residential burglary, sexual assault, or murder. The saliva on the stamp of a stalker's threatening letter, the perspiration on a rapist's mask, or the skin cells shed on the ligature of a strangled child may hold the key to solving a crime." National Institute of Justice, U.S. Department of Justice, *Using DNA to Solve Cold Cases* 1 (2002), *available at* http://www.ncjrs.org/pdffiles1/nij/194197.pdf (last visited Oct. 16, 2005).

nonetheless, the investigation and presentation of that evidence is one element of counsel's "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688; *see also, e.g., Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) ("lawyer who fails adequately to investigate, and to introduce . . . [evidence] that demonstrate his client's factual innocence, *or that raise[s] sufficient doubt . . . to undermine confidence in the verdict*, renders deficient performance" (emphasis added)). Furthermore, there is no reason to believe that DNA evidence is somehow more reliable – and therefore more to be sought after – in cases of sexual assault than it is in other cases where identity is an issue. In any case where DNA evidence might resolve that issue in the defendant's favor, competent counsel would at least investigate the possibility and make an informed decision. The failure of Mr. Riofta's trial counsel to do so rendered his performance deficient.

2. The prejudicial effect of counsel's deficient performance can only be precisely established by DNA testing of the white hat.

DNA testing which resulted in a CODIS match would show not a "reasonable probability" of prejudice, but a veritable certainty thereof.[6]

[6] Notably, that result is the one possibility which the State neglects to consider in its response. *See* Response at 13-14. IPNW has attempted, on its own initiative, to arrange a meeting with the Prosecuting Attorney, in order to discuss stipulations regarding what

Without access to such testing, Mr. Riofta is compelled to argue that he has already demonstrated "a reasonable probability that, but for counsel's unprofessional errors, the result of [his trial] would have been different." *Strickland*, 466 U.S. at 694. That argument is not without merit. "A reasonable probability," according to the Court in *Strickland*, "is a probability sufficient to undermine confidence in the outcome." *Id.* Counsel's deficiencies, considered together, give rise to such a probability, and were serious enough to "deprive [Mr. Riofta] of a fair trial, a trial whose result is reliable." *Id.* at 687.

Mr. Riofta has consistently maintained his innocence, and he believes there is more than a reasonable probability that DNA testing of the white hat would have revealed evidence resulting in his acquittal at trial. At the same time, and in spite of his own confidence, he recognizes that this Court may not be convinced that he has shown actual prejudice. *See Hews*, 99 Wn.2d at 88. It is for this reason that he has requested DNA testing of the white hat. At the very least, having made a prima facie showing of prejudice, *see* Section III.E, *infra*, he is entitled to a reference hearing on the issue. *Hews*, 99 Wn.2d at 88.

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test results would warrant further action on Mr. Riofta's behalf. The Prosecuting Attorney has declined to engage in such a discussion. *See* App. 1 (McMurtrie Declaration).

**B. Mr. Riofta has articulated a legitimate claim that the State's refusal to make the white hat available for DNA testing is a violation of his right to due process under the Fifth and Fourteenth Amendments to the Constitution.**

Mr. Riofta's due process claim is grounded in the Supreme Court's holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). That claim depends not on "the state's past duty to turn over exculpatory evidence at trial, but [on] its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding." *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992). Finally, while Mr. Riofta's personal restraint petition is based on the underlying ineffective assistance of counsel claim, his right to due process is implicated because the merits of that underlying claim cannot be fairly determined without DNA testing of the white hat.

*Goldsmith* is instructive not only in its recognition of the State's post-conviction obligation to provide access to exculpatory evidence, but in its resolution of the procedural complications which can result from the denial of such access. In that case, the district court found that several of the petitioner's claims for habeas relief – including a claim based on

ineffective assistance of counsel – were procedurally barred. The petitioner, meanwhile, alleged that the state was in possession of a semen sample "which would demonstrate his innocence and revive an otherwise defaulted ground for issuing a writ." 979 F.2d at 750. The Court of Appeals first observed that in order to overcome a state procedural bar and have his claims adjudicated in federal court, the petitioner would be required to "supplement his claim with a 'colorable showing of factual innocence.'"[7] *Id.* at 749. The court then noted the resulting dilemma:

> A semen sample, or tests thereof, might enable [Thomas] to make [the necessary] showing. However, if Thomas must make a colorable showing of innocence before the district court may order a full evidentiary hearing on his defaulted claims, Thomas is in something of a Catch-22. The sample, if it exists, is under the control of the state, and Thomas would appear to have no way to have it tested unless the federal courts intervene. But in order to make the showing which would justify federal court intervention, Thomas needs the semen sample.

*Id.* at 749. The court's solution was a model of common sense and simplicity: "We do not believe that Thomas' claim is defeated by this conundrum. Rather, we believe the state is under an obligation to come

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[7] Unlike the petitioner in *Herrera v. Collins*, however, the petitioner in *Goldsmith* did not base his petition for habeas relief on a claim of 'actual innocence." In *Herrera*, the Supreme Court explained "that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." 506 U.S. 390, 404, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). Like Mr. Riofta, the petitioner in *Goldsmith* sought access to evidence which would support his underlying constitutional claims. The Ninth Circuit Court of Appeals granted him that access, and Mr. Riofta asks this Court to do likewise.

forward with any exculpatory semen evidence in its possession." *Id.* (citing *Brady*, 373 U.S. at 87).[8]

Mr. Riofta asks this Court to recognize the State's similar obligation with regard to the white hat. Like the petitioner in *Goldsmith*, Mr. Riofta has requested DNA testing in order to facilitate the proper adjudication of his underlying constitutional claim, only to find himself in a "Catch-22" created by state opposition to the testing. In this respect, the facts of Mr. Riofta's case closely parallel the "conundrum" in *Goldsmith*,[9] and the outcome should be the same: the State should simply make the white hat available for DNA testing.

### C. The rule enunciated in *Herrera* is inapplicable to the issues presented by Mr. Riofta's personal restraint petition.

The Supreme Court's holding in *Herrera v. Collins* does not reach, and cannot resolve, the issues in this case. In *Herrera*, the Court simply reasserted that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. 390, 400, 113 S. Ct. 853, 122 L. Ed.

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[8] While the State argues that DNA testing of the white hat might not reveal exculpatory evidence, *see* Response at 13, the only way to test that assertion is to have the hat tested.

[9] One significant difference between this case and *Goldsmith* is that here, there is no question that the State is in possession of the evidence. The court in *Goldsmith* ruled: "If no such evidence exists, the state need only advise the district court of that fact." 979 F.2d at 750. In Mr. Riofta's case, the State acknowledges the existence of the white hat, but flatly refuses to release it for DNA testing.

2d 203 (1993) (citing *Townsend v. Sain*, 372 U.S. 293 (1963)). Mr. Riofta's personal restraint petition, however, is not based upon a "freestanding claim of actual innocence." *See id.* at 405. Nor does Mr. Riofta assert "that a claim of 'actual innocence' is . . . itself a constitutional claim." *See id.* at 404. Nor is he "attempt[ing] to color a 'newly discovered evidence' claim as a 'due process claim.'" *See* Response at 9. In fact, Mr. Riofta concedes that *there is no newly discovered evidence in this case.* Rather, one of the central contentions of his ineffective assistance of counsel claim is that any probative evidence which DNA testing of the white hat might reveal should have been discovered at trial, but was not. *See* Section III.A.1, *supra.*

The salient facts of *Herrera* are not "remarkably similar" to the facts of this case. *See* Response at 8. In *Herrera*, the petitioner asked the court to consider "a claim of 'actual innocence' based on newly discovered evidence." 506 U.S. at 396. That evidence consisted of affidavits "tending to show that his now-dead brother, rather than he, had been the perpetrator of the crime."[10] *Id.* at 393. Herrera himself was in

[10] There is no analogy between these affidavits and Jimmy Chea's statement regarding Mr. Riofta's case. Herrera offered the affidavits as newly discovered evidence in support of his claim of "actual innocence," and asked the Court to overturn his conviction on the basis of that evidence. Mr. Riofta is not asking this Court to overturn his conviction on the basis of Mr. Chea's statement, or even to consider "whether [Chea's statement] will probably change the outcome of the trial." *See* Response at 18 (citing *State v. Wicker*, 10 Wn.App. 905, 909, 520 P.2d 1404 (1974)) (emphasis omitted). The basis for Mr. Riofta's personal restraint petition is his ineffective assistance of counsel claim, and he

possession of those affidavits, and the courts below had already determined "that petitioner had failed to present 'any evidence of withholding exculpatory material by the prosecution.'" *Id.* at 397. Having found, on that basis, that the petitioner's *Brady* claim was without merit, the Court of Appeals for the Fifth Circuit regarded it as a "disingenuous . . . attempt to couch his claim of actual innocence in *Brady* terms." *Herrera*, 506 U.S. at 397 (citing *Herrera v. Collins*, 954 F.2d 1029, 1032 (5th Cir. 1992)). Consequently, Herrera came before the Supreme Court with a "freestanding claim of actual innocence." *See id.* at 402. The State attempts to find in these facts a parallel to the issues now before this Court, but an accurate analysis of the two cases shows that such a finding cannot be supported.

Mr. Riofta has stated a valid constitutional claim based on the violation of his Sixth Amendment right to the effective assistance of counsel. That claim, unlike a "freestanding claim of actual innocence," does not "require the habeas court to . . . determine anew whether or not petitioner is guilty." *Herrera*, 506 U.S. at 402. It does, however, require that Mr. Riofta demonstrate the prejudicial effect of counsel's deficiencies. *Strickland*, 466 U.S. at 687. Where the petitioner in *Herrera* sought to present testimonial evidence in order to demonstrate his factual

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has requested DNA testing of the white hat in order to provide reliable scientific evidence in support of that claim.

innocence, Mr. Riofta seeks access to DNA evidence in order to support his underlying Sixth Amendment claim. In *Herrera*, moreover, the petitioner possessed the evidence he sought to present, and there was no showing that the prosecution had withheld it from him at any time. In this case, it is undisputed that the prosecution is in possession of the white hat, and that it means to withhold it from Mr. Riofta. The State argues that Mr. Riofta's petition should be dismissed because he "has failed to meet his burden of showing actual prejudice arising from a constitutional error," while denying him access to the one piece of evidence by which he could make that showing. *See* Response at 8. Given these facts, *Brady* indeed obligates the prosecution to make the white hat available for DNA testing. *See* Section III.B, *supra*. Neither *Herrera*, nor the cases which have followed it, negate that obligation.

**D. As decisions subsequent to *Herrera* have shown, its holding likewise fails to dispose of other compelling justifications for post-conviction DNA testing.**

Neither of the cases invoked by the State to bolster its *Herrera* argument actually weighs against DNA testing of the white hat in Mr. Riofta's case. The decision of the Nebraska Supreme Court in *State v. El-Tabech*, for example, merely reflects the application of the *Herrera* rule to a case appropriately governed by it. Stated briefly, the petitioner in *El-Tabech* came before the Supreme Court of Nebraska with a claim that

"scientific analysis [of DNA evidence] would . . . 'conclusively establish [his] innocence of the crime charged.'" *State v. El-Tabech*, 610 N.W.2d 737, 743 (Neb. 2000). As in *Herrera*, the "essential problem" with this claim of actual innocence was "the requirement that there be a constitutional violation." *Id.* at 746. El-Tabech's ineffective assistance of counsel claim had been dismissed by the district court, and he had not appealed that dismissal. *Id.* at 743. Thus, while El-Tabech "couched the issue in terms of a due process violation," his petition failed to identify a constitutional violation which would justify overturning his conviction.[11] Mr. Riofta's petition does not suffer from this infirmity, and *El-Tabech* only helps to show why his case is not governed by *Herrera*. The second case that the State cites in order to show the reach of *Herrera*, on the other hand, positively undermines its arguments against DNA testing of the white hat.

1. The court in *Osborne v. State* affirmed that post-conviction DNA testing might be called for even where "substantial legal hurdles" have been found to exist.

In *Osborne v. State*, 110 P.3d 986 (Alaska Ct. App. 2005), the Alaska Court of Appeals ultimately embraced a test formulated to allow

[11] The concurrence in *El-Tabech* further argued that it could not be shown "that *any* type of favorable result using the latest DNA testing procedures would most likely produce an acquittal of El-Tabech in a new trial." 610 N.W.2d at 751 (Gerrard, J., concurring). Because the same cannot be said in Mr. Riofta's case, the white hat should be submitted for DNA testing.

post-conviction DNA testing in appropriate cases, and its decision to adopt that test is in fact more notable than its discussion of *Herrera*. There is no question that the *Osborne* court "followed *Herrera* and found that there is no federal due process right to present post-conviction evidence of one's innocence." Response at 11 (citing *Osborne* at 995). That finding, however, merely acknowledges a rule which is inapplicable where the petitioner, like Mr. Riofta, has stated a valid claim for habeas relief. *See* Section III.C, *supra*. As in *El-Tabech*, the details of the court's analysis in *Osborne* highlight this distinction: "It is not clear that there has been any constitutional violation in Osborne's case. We have already rejected Osborne's contention that his trial attorney was incompetent for failing to seek more discriminating DNA testing."[12] 110 P.3d at 993. Consequently, the court affirmed the trial judge's finding "that Osborne did not establish a prima facie case of ineffective assistance." *Id.* at 987. "In spite of the substantial legal hurdles . . . described here," however, the court found itself "reluctant to hold that Alaska law offers no remedy to defendants who could prove their factual innocence." *Id.* at 995. Instead,

[12] Specifically, the Alaska Court of Appeals determined, on the basis of counsel's own assertion that "Osborne was in a strategically better position without [more specific] DNA testing," that counsel's performance was not deficient, but the result of a "tactical decision." 110 P.3d at 991. Mr. Riofta's trial counsel has made no similar assertion, *see* Section III.A.1, *supra*, and his failure even to consider DNA testing of the white hat was not a tactical decision.

the case was remanded for further consideration under a three-part test derived from the decisions of other state courts.[13] *See id.* at 995.

In his request for DNA testing, Mr. Riofta would prevail under the rule adopted by the *Osborne* court. That rule would require Mr. Riofta to show "(1) that [his] conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning [his] identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue."[14] *Osborne*, 110 P.3d at 995. First, Mr. Riofta's conviction rested exclusively on the victim's eyewitness identification; none of the other evidence indicated that Mr. Riofta was the shooter. Second, there is demonstrable doubt concerning Mr. Riofta's identification. The inconsistencies in Ratthana Sok's statements to the police raise doubts regarding not only his certainty, but his credibility. *See* Brief at 14-18. The composition and presentation of

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[13] In *Sewell v. State*, for instance, the Indiana Court of Appeals stated: "The potential for exculpation by DNA comparison parallels to the potential for accurate identification. Therefore, *Brady* is implicated in post-conviction requests for forensic tests only where a conviction rested largely upon identification evidence and advanced technology could definitively establish the accused's innocence." 592 N.E.2d 705, 708 (Ind. Ct. App. 1992).

[14] The court did *not* find that "Osborne's only remedy was to make an argument under state law, arguing either due process or a newly discovered evidence claim." Response at 11. Instead, the superior court was instructed to determine whether state law *barred* Mr. Osborne's claim. 110 P.3d at 995. Then, "if the superior court determines that Osborne satisfies the three requirements for post-conviction DNA testing, but also that his claim is [statutorily] barred . . . the superior court should . . . consider whether the due process clause of the Alaska Constitution requires us to disregard the statutory limitations and allow Osborne to pursue his claim." *Id.*

the photomontage raises doubts regarding the reliability of his later identification. *See id.* Scientific research raises doubts regarding the general reliability of eyewitness identifications, especially in cases such as this one. *See id.* Jimmy Chea's statement to his attorney raises doubts about the identity of the shooter. Finally, scientific testing which resulted in a CODIS match would likely be conclusive on the issue of the shooter's identity and the accuracy of the eyewitness identification.[15]

2. The decision of the Indiana Supreme Court in *Lacey v. State* recognizes that post-conviction DNA testing should be granted where it will allow a petitioner's underlying constitutional claim to be determined on the merits.

The recently-decided *Lacey v. State*, 829 N.E.2d 518 (Ind. 2005), further undermines the assertion that "[j]urisdictions that have allowed DNA testing or evidence as part of postconviction proceedings either have broader statutory provisions than those in Nebraska, have found a constitutional right under their state constitution, or were decided prior to the U.S. Supreme Court's decision in *Herrera*." Response at 10 (quoting *El-Tabech,* 610 N.W.2d at 747 ). The factual and procedural similarities between the *Lacey* case and Mr. Riofta's are striking. In *Lacey*, the petitioner had been convicted of robbery at a trial in which, the parties agreed, "the evidence . . . indicated that [the perpetrator] wore a baseball

[15] As Mr. Riofta recognizes, *any* result of DNA testing on the white hat is likely to be conclusive with regard to his personal restraint petition. Either the testing will provide evidence supporting his ineffective assistance of counsel claim, or it will not.

hat and that the police found the hat on the ground . . . following the robbery." 829 N.E.2d at 518. In post-conviction proceedings, Lacey requested DNA testing of the hat "in order to prosecute his then-pending petition for post-conviction relief."[16] *Id.* at 519. His request was denied by the lower courts, but the Indiana Supreme Court reversed, finding that "Lacey was entitled to employ reasonable means in order to obtain evidence in support of his petition. It is our understanding from the record that he simply sought to obtain the hat so that his counsel could submit it to DNA testing at his . . . expense." *Id.* at 519. In its unanimous ruling, the Indiana Supreme Court did not invoke its state constitution, and it declined the State's invitation to apply Indiana's "special statute on forensic DNA testing." *Id.* at 519. Instead, the court granted DNA testing of the hat based only on the "normal rules of discovery." *Id.* at 519-20. That decision, like the Ninth Circuit's decision in *Goldsmith*, was an appropriately simple response to a relatively uncomplicated question.

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[16] Although it is not mentioned in the court's published opinion, Lacey's petition for post-conviction relief was based on a constitutional claim, and not upon a claim of actual innocence. Here again, the resemblance between the two cases truly is remarkable. As the Indiana Supreme Court recognized at oral argument, Lacey sought DNA testing of the hat in order to support an ineffective assistance of counsel claim, based on counsel's failure to pursue such testing at trial. *See* Indiana Courts, Oral Arguments Online, *at* http://www.indianacourts.org/apps/webcasts/default.aspx (last visited Oct. 15, 2005) (providing access to Real Media, Oral Arguments in *William Lacey v. State of Indiana*, *at* http://realvideo.ind.net:8080/ramgen/real/SupremeCourt/04192005_0100pm.rm (Apr. 19, 2005) (streaming video with sound)).

## E. Both Washington law and the Rules of Appellate Procedure indicate that the white hat should be submitted for DNA testing.

There is nothing to prevent this Court from reaching – on the same basis, and with as little difficulty – the same conclusion reached by the Indiana Supreme Court in *Lacey*. With regard to personal restraint petitions, Washington's Rules of Appellate Procedure provide:

> The Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing. *The Chief Judge may enter other orders necessary to obtain a prompt determination of the petition on the merits.*

RAP 16.11(b) (emphasis added). This rule was anticipated by the procedures outlined in *Wright v. Morris*, in which Washington Supreme Court stated:

> The chief judge shall examine the petition and if he finds it patently frivolous, he shall deny it. . . . If the petition is not patently frivolous and is grounded upon a factual allegation, the truth of which can be determined only by holding an evidentiary hearing (that is, if the petition alleges a material fact which is not of record in the case and which the court does not judicially know), the chief judge shall refer the matter to the appropriate trial court . . . for hearing.

85 Wn.2d 899, 903-04, 540 P.2d 893 (1975). Mr. Riofta's request for DNA testing follows from the recognition that it may not be possible for his petition to "be determined solely on the record," and DNA testing would facilitate a "prompt determination of the petition on the merits." Therefore, the prosecution should be ordered to release the white hat for DNA testing.

While the State relies on the rule announced in *Hews*, this Court's application of that rule should be informed by RAP 16.11 and *Wright*, both of which weigh in favor of granting Mr. Riofta's request for DNA testing. In *Hews*, the Supreme Court of Washington stated "that in the absence of at least a prima facie case [of prejudice] . . . a Personal Restraint Petition must be dismissed." 99 Wn.2d at 93. In light of RAP 16.11(b) and the Court's instructions in *Wright*, Mr. Riofta has made the necessary showing. His petition is not frivolous, much less patently so, and turns on the factual question of whether the white hat contains exculpatory DNA evidence. That question, moreover, is capable of being answered with extraordinary certainty and precision: testing either *will* or *will not* result in a CODIS match. This is not a case in which "the petition . . . has no apparent basis in provable fact." *Rice*, 118 Wn.2d at 886. Mr. Riofta has "state[d] with particularity facts" – and facts susceptible of the most certain proof – "which, if proven, would entitle him to relief." *Id.*

Washington law anticipates proceedings wherein a petitioner may present "competent, admissible evidence" in support of his claims, and "the State must meet the petitioner's evidence with its own competent evidence." *Id.* The prosecution should not be allowed to forestall such proceedings by withholding potentially exculpatory evidence. The white hat should be released for DNA testing.

Should this Court nonetheless determine that Mr. Riofta has *not* made a prima facie showing of prejudice, the fact remains that the prosecution continues to withhold the only evidence by which he might do so, in which case the *Brady* rule still applies. In that event, rather than summarily dismissing Mr. Riofta's personal restraint petition, this Court should order the prosecution to release the white hat for DNA testing, thereby providing Mr. Riofta with the opportunity to meet the burden imposed upon him. RAP 16.11(b) authorizes such an order, *Wright* requires it, and justice in the end demands it. The Ninth Circuit Court of Appeals in *Goldsmith*, the Alaska Court of Appeals in *Osborne*, the Indiana Court of Appeals in *Sewell*,[17] and the Indiana Supreme Court in *Lacey* have all reached similar conclusions.

[17] Whereas Mr. Riofta's Sixth Amendment claim is based on trial counsel's failure to request DNA testing at the time of trial, Sewell was simply convicted before the advent of DNA testing. *See* 592 N.E.2d at 705-06. The consequence, however, is the same. For Mr. Riofta, as for Mr. Sewell, the DNA evidence was effectively "unavailable . . . at the time of his trial." *See id.* at 707. Moreover, the Indiana Court of Appeals also granted

**F. Where DNA testing in post-conviction proceedings would not only establish the viability of petitioner's constitutional claim, but might identify the actual perpetrator of the crime, the value of such testing must outweigh the State's interest in preventing it.**

Whatever interest the State may have in withholding the white hat, the potential benefits of DNA testing in Mr. Riofta's case far outweigh it. The State's recitation of concerns from *Hagler*, Response at 6 (citing *In re Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982)), is unavailing when the question is whether to perform DNA testing which can only provide for a more reliable determination of Mr. Riofta's claims. If Mr. Riofta's conviction is indeed unlawful, then "finality of litigation" and "the prominence of trial" will not be reasons enough to keep him in prison. DNA testing which will assist in the underlying determination necessarily poses an even lesser concern. Furthermore, while collateral relief "sometimes costs society the right to punish admitted offenders" – a category to which Mr. Riofta, incidentally, does not belong – the possibility of a wrongful convictions poses an intolerable double threat:

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Sewell access to state lab reports alleged to contain the perpetrator's blood type, even though "Sewell concede[d] that he did not seek to discover the . . . reports prior to trial, despite the availability of blood type comparisons at that time." *Id.* at 708. The court explained: "We decline to find waiver . . . due to the enhanced exculpatory potential of the . . . reports when examined in conjunction with a DNA comparison. Permitting the discovery of the laboratory reports would promote the orderly ascertainment of truth under the circumstances of the present case. The State has advanced no paramount interest in non-disclosure." *Id.* at 708-09. A similar concern for the truth, as opposed to an undue concern for procedural restraints, should lead to DNA testing in Mr. Riofta's case.

not only that the guilty will remain free from punishment, but that the innocent will not. DNA testing is valuable precisely because it provides a powerful tool, and an extraordinarily reliable basis, for distinguishing one from the other.

The State warns that granting Mr. Riofta's request would set "a very dangerous precedent," inviting abuse of post-conviction DNA testing provisions: "A defendant could intentionally decide not to seek DNA testing at the trial, knowing very well that it could contain incriminating evidence. Then, having nothing to lose after a guilty verdict, a defendant would make a post-conviction request for such testing possibly allowing him a second time in front of the jury." Response at 15. This argument might be persuasive in a case where the habeas petitioner hoped to base his claim on the absence of incriminating DNA; but a defendant who recognized that DNA evidence might incriminate him at trial is otherwise unlikely to conclude that such evidence would exonerate him at a second trial. The court in *Sewell v. State* rejected an argument similar to the State's here, and for similar reasons:

> Finally, we address the State's contention that allowing a DNA comparison in this case will encourage a flood of convicted rapists to clamor for forensic tests at State expense. We observe that only those petitioners misidentified at trial could benefit from a definitive identification procedure such as a DNA comparison.

592 N.E.2d 705, 708 (Ind. Ct. App. 1992). At the same time, it is unlikely that a defendant who "intentionally decided" to forego DNA testing at trial would be able to prevail on an ineffective assistance of counsel claim, and there is no reason to assume that such a defendant would be entitled to habeas relief on any other ground. Absent a legitimate constitutional claim, *Herrera* indeed operates as a bar to post-conviction relief. *See* Section III.C, *supra*.

Mr. Riofta anticipates that testing will reveal not merely the *absence* of his own DNA, but the *presence* of DNA matching the CODIS profile of a convicted felon;[18] thus, a result favorable to Mr. Riofta would have wide-ranging benefits. First, as the Supreme Court pointed out in *Brady*, "our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87. Conversely, even the belated exoneration of a defendant who was wrongly convicted has considerable redemptive value, demonstrating that our system is not only motivated by a concern for justice, but capable of correcting its mistakes. The presence on the white hat of DNA matching the CODIS profile of a violent offender would not only support Mr. Riofta's claim for habeas relief, but would

[18] This fact address both of those arguments against testing which begin by questioning the probative potential of DNA evidence in this case: first, that "[t]he absence of defendant's DNA material is hardly exculpatory;" and second, that "the presence of someone else's DNA proves nothing." Response at 13. If that "someone else" were a convicted felon, though, the presence of their DNA on the white hat would be highly exculpatory.

provide nearly irrefutable evidence of the identity of Ratthana Sok's actual assailant. Both Mr. Sok and society as a whole are entitled to the assurance that the real perpetrator has been or will be convicted, and that an innocent man has not. DNA testing of the white hat has the potential to provide that assurance.

## IV. CONCLUSION

Mr. Riofta has invoked his right to due process in order to ensure that his personal restraint petition, based on an ineffective assistance of counsel claim, will be properly decided on the merits. Thus, Mr. Riofta's due process and ineffective assistance of counsel claims are not "arguments in the alternative." *See* Response at 1. Mr. Riofta's underlying constitutional claim is that his Sixth Amendment right to counsel was violated, and his conviction is vulnerable to collateral attack on that basis. In order to support that valid constitutional claim, he must show that counsel's performance was deficient, and that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. Mr. Riofta has met his burden of showing deficient performance, because trial counsel's failure to request DNA testing of the white hat "fell below an objective standard of reasonableness." *Id.* at 688. To show prejudice, Mr. Riofta must demonstrate a reasonable probability that the outcome of his trial would have been different if the white hat *had* been tested. *Id.* at 694.

In recognition of that burden, Mr. Riofta has requested that the Prosecution release the white hat for DNA testing.

In spite of the fact that such testing would provide a definite and reliable basis for determining the viability of Mr. Riofta's ineffective assistance of counsel claim, the Prosecuting Attorney has unequivocally denied Mr. Riofta's request. Mr. Riofta is therefore compelled to assert his due process right of access to exculpatory evidence. Put simply, if the prosecution is in possession of exculpatory evidence, then it has an obligation under *Brady v. Maryland* to make it available to Mr. Riofta. The only way to ascertain whether the prosecution is in possession of exculpatory evidence, however, is to submit the white hat to DNA testing. The State, therefore, should not be allowed to prevent such testing, particularly in the absence of any compelling reason for doing so.

Finally, Mr. Riofta does not assert a constitutional right to discovery generally, but a due process right of access to exculpatory evidence. At least one court, in granting post-conviction access to DNA evidence, has recognized that "the *Brady* rule can operate to require disclosure of evidence not otherwise discoverable."[19] *Sewell*, 592 N.E.2d

[19] "Ordinarily," the court explained, "when discovery of criminal evidence is sought, the trial court is vested with discretion to weigh the defendant's interest in discovery against the State's interest in nondisclosure. However, where the specified evidence is exculpatory, the defendant's right to fundamental due process outweighs the State's interest in nondisclosure." *Sewell*, 592 N.E.2d at 707, n.4 (citations omitted).

at 706. Thus, it is not sufficient to observe that "a defendant has no constitutional right to either counsel or discovery in making a collateral attack,"[20] *see* Response at 18 (citing *In re Davis*, 152 Wn.2d 647, 755, 101 P.3d 1 (2004)) – especially when the Washington Supreme Court was quick to point out that "our statutes and our court rules nevertheless afford a defendant with both." 152 Wn.2d at 755. While the former observation fails to dispose of Mr. Riofta's claim, the latter only strengthens it.

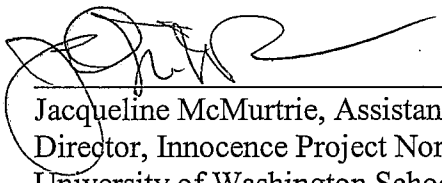
DNA testing of the white hat may be crucial to the vindication of Mr. Riofta's constitutional rights. The Prosecution has the hat. There is nothing to be lost by testing it. In short, the hat should be tested, and Mr. Riofta prevails upon this Court to so find.

[20] The State offers this observation in response to Mr. Riofta's assertion of his Sixth Amendment right to compulsory process. While Mr. Riofta does not herein abandon that claim, it should be unnecessary for this Court to decide it. RAP 16.11(b) makes adequate provision for "post-conviction evidence gathering." *See* Response at 19. That provision alone argues in favor of DNA testing in this case; and given the prosecution's obligations under *Brady*, Mr. Riofta is entitled to have the white hat tested.

For the reasons stated herein, Petitioner respectfully requests that this Court either issue an order to release the white hat for DNA testing or, in the alternative, remand for a reference hearing on those factual issues which remain in dispute.

Dated this 17th day of October, 2005.

Respectfully Submitted,



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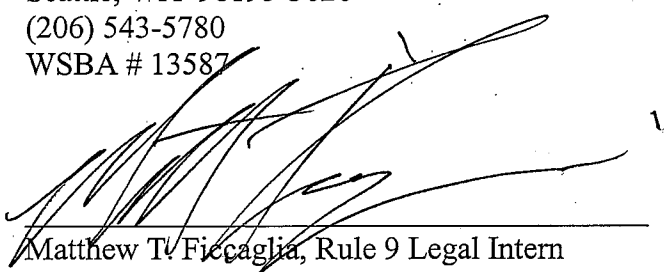

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